

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

COSCO AGENCIES (LOS ANGELES), INC.,¹

Employer

and

Case 21-RC-20441

OFFICE CLERICAL UNIT, MARINE CLERKS
ASSOCIATION, INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION, LOCAL 63, AFL-CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's ruling made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Union appears as corrected at the hearing.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time receptionists, inbound customer service coordinators, outbound customer service coordinators, booking clerks, accounts receivable clerks, freight cashier clerks, equipment assistants, pricing analysts, booking supervisors, outbound customer service supervisors, inbound customer service supervisors, assistant managers - accounts payable, sales associate, regional sales associate, MIS assistant/BPS analysts, BPS analysts, and the inbound customer service coordinator employees employed at the Employers facility at 515 South Flower Street, Suite 4450, Los Angeles, California; excluding all other employees, MIS managers, inbound customer service managers, outside sales representatives, deputy general managers in accounting, managers of accounts receivables, managers of traffic/outbound customer service/booking, managers of VSA services, freight cashier supervisor, assistant managers - equipment control, district sales manager, regional sales manager,

professional employees, guards, and supervisors as defined in the Act.³

I. Issues and Findings

The first issue concerns the supervisory status of Inbound Customer Service Supervisor Liberty Adams, herein called Adams. Contrary to the Petitioner, the Employer contends that she is a supervisor as defined in Section 2(11) of the Act, and that she should be excluded. In addition, contrary to the Petitioner, the Employer contends that because they do not share a community of interest with the unit employees, the sales associates, the regional sales associate, the MIS assistant/BPS analyst, and the BPS analyst positions must be excluded from the appropriate unit. Finally, contrary to the Petitioner, the Employer contends that Inbound Customer Service Coordinator Alan Mota, herein called Mota, is a temporary employee who should also be excluded from the unit.

³At the hearing, the parties stipulated that the appropriate unit should include all full-time and regular part-time receptionists, inbound customer service coordinators, accounts receivable clerks, freight cashier clerks, equipment assistants, pricing analysts, booking supervisors, outbound customer service supervisors, and assistant managers – accounts payable; excluding all MIS managers, inbound customer service managers, deputy general managers in accounting, managers of accounts receivables, managers of traffic/outbound customer service/booking, managers of equipment control, managers of pricing, administrative assistants, managers of VSA services, freight cashier supervisor, assistant managers – equipment control, as well as professional employees, guards, and supervisors, as defined in the Act. At the hearing the parties further stipulated that the unit should exclude the classifications of district sales manager and regional sales manager as being supervisors. The petitioner has not stated in the petition or at hearing on the record an intent to represent outside sales representatives, therefore they are excluded from the unit.

For the reasons noted below, I find that Adams is not a supervisor and that she should be included in the unit; that the disputed classifications noted above share a sufficient community of interest with the unit employees, and that accordingly, the petitioned-for unit is an appropriate unit; and finally, that the record herein is insufficient to permit me to determine whether Mota is a temporary employee requiring his exclusion from the unit.

II. The Employer's Business

The Employer, a Delaware corporation, provides shipping agency services for vessels engaged in international trade. While the Employer has facilities located throughout the United States, the only facility at issue herein is located at 515 South Flower Street, Suite 4450, Los Angeles, California. This location is an office, occupying half a floor and consists of approximately 12,500 square feet. The approximately 31 employees in the petitioned-for unit work at the Los Angeles office in cubicle offices arranged by department. The Los Angeles office is comprised of several departments including administration, management information systems ("M.I.S."), inbound customer service, accounting, outbound customer service, booking, equipment control, pricing, sales, and accounting. The Los Angeles office and the New Jersey headquarters are the only two offices in the country that file contracts. The Los

Angeles office files contracts for San Francisco, California and Seattle, Washington. Both the president of the company and the regional executive vice president, work out of the Los Angeles office.

III. Supervisory Issue

Contrary to the Petitioner, the Employer contends that Adams is a supervisor as defined in Section 2(11) of the Act, and that she should be excluded from the unit.

A. Board Standards

The party asserting that individuals are supervisors under the Act bears the burden of proving supervisory status. Bennett Industries, Inc., 313 NLRB 1363 (1994); Tuscon Gas and Electric Co. 1, 241 NLRB 181, 181 (1979); NLRB v. Kentucky River Community Care, Inc., et al., 121 S. Ct. 1861 (May 29, 2001). Section 2(11) of the Act defines a supervisor as an individual who possesses:

"authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the

employer's interest and involves the use of independent judgment in a manner which is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981). The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner, however, does not confer statutory supervisory status on employees. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985); Advanced Mining Group, 260 NLRB 486, 507 (1982).

Because supervisory status removes individuals from some of the protections of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S Rep No 105 80th Cong 1 Sec 4 (1947); Ten Broeck Commons, 320 NLRB 806, 809 (1996). Furthermore, the Board holds that supervisory status should not be found "whenever the evidence is in conflict or otherwise inconclusive on a particular indicia." Phelps Community Medical Center, 295 NLRB 486 (1989).

B. Facts Presented Regarding Supervisory Status

(1) Substitution for Inbound Customer Service Manager

The record reflects that the inbound customer service supervisor reports directly to the inbound customer service manager at the Los Angeles facility. The inbound customer service supervisor substitutes for the inbound customer service manager when the

manager is absent from the facility. The record reveals that the inbound customer service supervisor filled in for the inbound customer service manager on three occasions. On each occasion, the inbound customer service supervisor attended a 1-hour Monday managers' meeting where the inbound customer service supervisor read off numbers to vessels from a shipping report that had been updated by a clerk. The inbound customer service supervisor took notes during the Monday meetings and provided them to the inbound customer service manager. During the inbound customer service manager's 2-week absence, the inbound customer service supervisor was the person in charge of the inbound customer service department. The record reflects that during the manager's absence, the inbound customer service supervisor did not approve the premounting of a trailer that was not covered by a contract.

(2) Assignment and Direction of Work

The record reflects that the inbound customer service supervisor arranges and keeps track of a rotation of employees covering customer service phones during their lunch time of 12:00 p.m. to 1:00 p.m. The customer service supervisor also assigns work to other inbound customer service representatives when unable to complete work.

(3) Employee Discipline

The record reflects that the inbound customer service supervisor has no authority to independently issue discipline. Although the record discloses that the inbound customer service supervisor has the authority to issue warning notices, no evidence was presented that one has been issued in the 6 months prior to the hearing. The discipline procedure requires that the inbound customer service manager be advised of misconduct and then presented to the regional executive vice president for a decision whether a verbal or written reprimand or letter is necessary. The record revealed one instance where the inbound customer service supervisor reported the misconduct of an inbound customer service coordinator to the regional executive vice president. Although the inbound customer service supervisor may report misconduct, no evidence was presented that discipline has been recommended.

(4) Authority to Hire and Fire

The record reflects that the inbound customer service supervisor would be part of the interviewing process but does not have the authority to hire. The inbound customer service supervisor has the authority to recommend that employees not be hired, although the present inbound customer service supervisor has not ever exercised that authority. If the inbound customer

service supervisor objected to the hiring of an individual, the manager may decide not to hire that person.

The inbound customer service supervisor may recommend firing an employee and report misconduct and performance problems to the inbound customer service manager. Performance evaluations are normally prepared by the inbound customer service manager. On one occasion, the inbound customer service supervisor and the inbound customer service manager reported to the regional vice president that an inbound customer service coordinator had performance problems and failed to follow instructions. Thereafter, the regional vice president made the decision whether to keep the employee. The record reflects that the inbound customer service supervisor does not have the authority to independently fire an employee.

(5) Time Cards

The record reflects that the inbound customer service supervisor has authority to approve time off when the inbound customer service manager is not available. The regional vice president signs off on leave requests for vacation and there is no evidence that the inbound customer service representative evaluates leave requests or exercises discretion in signing off on leave requests. The record reflects that the inbound customer service supervisor has not ever authorized employee absence or leave requests.

C. Analysis

Based on the record, I conclude that the Employer has failed to meet its burden to establish that the inbound customer service supervisor is a supervisor as defined in Section 2(11) of the Act so as to require her exclusion from the unit.

Specifically, I find the record does not demonstrate that the inbound customer service supervisor has authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment.

The inbound customer service supervisor's substitution for the inbound customer service manager was only for 2 weeks and is insufficient to confer supervisory status. The inbound customer service supervisors only attended three Monday management meetings. Thus the exercise of some supervisory authority in a sporadic manner, as disclosed by this record, does not confer statutory supervisory status on Adams. Chicago Metallic Corp., 273 NLRB at 1689, Advanced Mining Group, 260 NLRB at 507. In addition, there is no evidence that Adams exercises authority to resolve problems in the inbound customer service manager's absence.

While the inbound customer service supervisor provides routine assignment of work on a calendar rotation schedule for employees to work during the lunch hour, this responsibility does not require independent judgment and is insufficient to confer supervisory status. Although the inbound customer service supervisor sometimes assigns employees work that she can not complete, it does not demonstrate independent judgement in directing employees to accomplish the work. The Board has found that "responsibility for planning or designing a project, which may involve determining such matters as appropriate staffing, materials, and schedule, must be distinguished from the exercise of authority and independent judgment in the role of assigning and directing employees in the accomplishment of the work."

S.D.I. Operating Partners, L.P., Harding Glass Division,

321 NLRB 111, 111 (1996). The record supports a finding that Adams' responsibilities constitute merely assuring appropriate staffing to handle both the lunch time duty and work she can not complete, rather than directing employees in the accomplishment of their work.

With regard to any authority to hire or fire, the record demonstrates that Adams is limited to the role of reporting misconduct or performance problems to the inbound customer service manager. Although the reporting of the inbound customer service supervisor is sometimes considered by the

manager, the decision to hire or fire remains with the inbound customer service manager and the regional vice president. The Board has held that when an evaluation does not by itself affect the wages and or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. Elmhurst Extended Care Facilities 329 NLRB 535 (1999). Accordingly, the record fails to establish that the inbound customer service supervisor exercises independent judgement or effectively recommends that an employee be hired or fired.

While the inbound customer service supervisor has the authority to authorize employee absences when the inbound customer service manager is unavailable, the record also revealed that she does so in a routine manner. In this regard, the Board has held that "responsibilities concerning recording hours and signing timecards are routine and clerical in nature and insufficient to establish supervisors status." John N. Hansen Co., Inc., 293 NLRB 63, 64 (1989) The record is devoid of any evidence that the inbound customer service supervisor has exercised independent judgement in the determination of whether to grant a leave request.

The Employer contends that the inbound customer service supervisor has the authority to effectively recommend that an employee be hired, fired and, disciplined, and in doing

so exerts substantial independent judgment, citing Quality Chemical Co., 324 NLRB 328, 330 (1997) and Caremore, Inc. V. NLRB, 129 F. 3d 365 (6th Cir. 1997). However, the mere assertion that the inbound customer service supervisor reported performance concerns of an inbound customer service coordinator is insufficient to establish supervisor status. The Board has held that when an evaluation does not by itself affect the wages and or job status after the employee is evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. Elmhurst Extended Care Facilities, 329 NLRB 535 (1999). There is no evidence on the record that the performance concerns affected the inbound customer service coordinator's wages or job status.

The Employer also contends that the inbound customer service supervisor directs employees to cover the phones during lunch, and in doing so exerts substantial independent judgment. As noted above, the record reveals that the inbound customer service supervisor provides routine assignment of work on a calendar rotation schedule for employees to work during the lunch hour. Contrary to the Employer's contention, the record does not demonstrate that the inbound customer service supervisor uses independent judgment in assigning employees to cover the phones based on employee skill or qualifications.

The Employer also contends that the inbound customer supervisor took over the inbound customer service manager's duties in her absence. The record demonstrates that while the inbound customer supervisor took over the inbound customer service manager's duties in her absence for 2 weeks, she performed minimal supervisory tasks. The Employer contends that the facts in this case are similar to the facts in Illinois Power Co., 155 NLRB 1097 (1965). In Illinois Power, the power plant control room supervisors were authorized to hear grievances, administer and recommend discipline, approve and recommend changes in the status of assigned personnel. In Illinois Power, it was particularly important that the control room supervisors performed the substitute role for regular daytime supervisors when they were not regularly on duty on Saturdays, Sundays, and holidays, and on the normal second and third shifts. In the present case, the inbound customer service supervisor is not authorized to hear grievances, administer and recommend discipline, approve and recommend changes in the status of assigned personnel. Moreover, in the present case, the record reflects that the inbound customer service supervisor only performed as the substitute for the inbound customer service manager at three meetings and for 2 weeks, which was not a regular and recurring assignment. Therefore, the facts of the present case are not similar to Illinois Power.

The Employer also asserts that Birmingham Fabricating Co., 140 NLRB 640 (1963) supports its contention that the inbound customer service supervisor takes over the assigned supervisory duties of inbound customer service manager. In Birmingham Fabricating Co., the leaderman was the only employee on the shift having any supervisory authority when the foreman left the plant on a daily basis. In Birmingham Fabricating Co., on one occasion, the leaderman notified an employee that he was laid off and exercised the authority to discipline employees. The present case is factually dissimilar to Birmingham Fabricating Co. The record does not support the finding that the inbound customer service supervisor regularly takes over the authority of the inbound customer service manager or has ever fired an employee. In the present case the inbound customer supervisor has only substituted for the limited period of three meetings and a 2 week period which is not regular and substantial and fails to warrant a finding of supervisory status.

Based on the noted considerations and the record as a whole, I conclude that the Employer has failed to establish that inbound customer service supervisor Adams is a supervisor as defined by the Act. I shall, therefore, include her in the appropriate unit. Opelika Foundry, 281 NLRB at 899, T.K. Harvin & Sons, Inc., 316 NLRB 1995.

IV. Unit Composition Issues

Contrary to the Petitioner, the Employer contends that because they do not share a community of interest with the unit employees, the sales associates, the regional sales associate, the MIS assistant/BPS analyst, and the BPS analyst positions must be excluded from the appropriate unit.

A. Board Standards

In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. P.J. Dick Contracting, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the petitioner. If it is appropriate, [the] inquiry ends. If however, it is inappropriate, the board will scrutinize the Employer's proposals." Dezcon, Inc., 259 NLRB 109, 111 (1989).

In determining whether a unit is appropriate, the Board considers whether the employees in the petitioned-for unit share a community of interest. NLRB v. Action Automotive, 469 U.S. 490, 494 (1985). The Board considers the following terms and conditions of employment in assessing whether a sufficient community of interest exists among employees: wages; hours of work; employment benefits; nature of supervision; difference in experience and skills; interchange or contact with other

employees; and integration with the work functions of other employees. Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

Technical employees are defined as employees who do not meet the strict requirements of the term "professional employee" as defined in the Act, but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools, or through special courses. The Folger Coffee Co., 250 NLRB, 1,2 (1980). The inclusion of technical employees in a unit is also based on an analysis of community of interest factors. Virginia Mfg., 311 NLRB 992, 993 (1993).

B. Sales Associates⁴

The sales associates work in the Los Angeles office Sales Department and report to the district sales manager in Los Angeles. The Los Angeles Sales Department reports to a national sales organization in Secaucus, New Jersey. The sales associates performance is reviewed on a quarterly basis by the district sales manager. The sales associates' payroll is administered through the headquarter's office in Secaucus, New Jersey, and they are entitled to a separate incentive plan for bonuses from the national sales office in New Jersey. The sales associates

⁴ The record reveals that there are two sales associates in the Los Angeles Office.

work on the same floor and in the same work area as the unit employees, however, their partitions are higher to provide sound protection and privacy.

The sales associates provide "assistance" to outside sales representatives by taking incoming calls from shippers, handling customer service issues and verifying prices. The sales associates spend 80 to 90 percent of their time working on e-mails, talking to the outside sales representatives, taking phone calls from customers, ensuring e-mails are sent to the pricing department, and sending e-mails on shippers' fare issues to various departments. The sales associates have contact with outside sales representatives about five to six times a day over the phone and each phone call can last up to 15 to 20 minutes. The outside sales representatives are out of the office 4½ days a week. The sales associates currently perform the clerical preparation for import contracts. The sales associates keep track of electronic mail message and phone calls while the outside sales representatives are out of the office. The sales associates also conduct telemarketing calls of not more than five calls a week to assist outside sales representatives. The sales associates work with booking employees to ensure the availability of equipment in a remote location and make in person contact to ensure equipment in the system has not been

booked for that day. Sales associates also work with pricing analysts, who are in the unit, to review rates, review what is included in the service contract and work together putting contracts together.

The sales associates have the same pay dates, meal benefits, and medical benefits package as the unit employees. The sales associates are in close physical proximity to the pricing analysts. The sales associates work areas are located by the windows and the pricing employees are in the center in cubicles about 30 feet from the sales associates. The sales associates are on the same floor as the other unit employees and 75 to 80 feet away from the inbound customer service coordinators. All employees of the Employer utilize the same AS-400 computer system. The sales associates use the same lunch area as the other unit employees. The hours of operation for sales associates is the same as for the other Los Angeles employees. Employees work from 8:00 a.m. to 9:00 a.m. and leave work from 4:00 p.m. to 5:00 p.m. The same sign-in sheet is used for all the Employer's Los Angeles employees to record overtime and days worked.

The sales associates' wages are paid on the same hourly basis as the other employees in the unit, except that they receive a separate incentive plan for bonuses from the National Sales office in New Jersey.

The sales associates are in frequent contact with employees of the Employer's Los Angeles office from different departments and there is an integration of the functions of sales associates and the pricing department employees. The sales associates have frequent contact with the booking, and pricing department hourly employees in preparing contracts together and ensuring the equipment has not been booked that day. The sales associates take incoming calls from shippers, handle customer service issues, pricing and perform a limited amount of telephone sales calls for salesmen in the field. The sales associates perform the clerical preparation for import contracts and sales associates keep track of electronic mail message and phone calls while the outside sales representatives are out of the office. In performing these functions, the sales support use the same computer system as the other hourly employees at the Los Angeles office.

In contending that the regional sales associate and sales associates lack a community of interest with the petitioned-for unit employees, the Employer first cites Consolidated Papers, Inc., 274 NLRB 1356 (1985). That case is inapposite, as the employer's sales representatives were excluded from the bargaining unit because the petitioner did not seek to represent them.

Second, the Employer contends that the factors considered in Consolidated Papers, Inc. are present in the instant case and support its exclusion argument. In Consolidated Papers, Inc., the merchant account representatives' main objective was to maximize the Employer's product sales by developing cordial and lasting relationships with their customers and manage each sale from its origin at the point of initial inquiry through the product's final destination. Thus, in Consolidated Papers, Inc., merchant account representatives were required to travel occasionally to customers and were hired based on their sales experience and sales aptitude. In the present case, the sales associates do not manage any sales transactions from the point of origin. In the present case, the sales representatives do not travel to customers and are not required to perform functions similar to the merchant account representatives in Consolidated Papers, Inc. As is noted above, the sales associates remain at the Los Angeles office and perform telephone, e-mail and clerical support functions for the outside sales representatives. The sales associates have minimal contact with the outside sales representatives because they only talk to them about five to six times a day over the phone. The outside sales representatives are out of the office performing sales with customers 4 ½ days a week. Therefore, the sales associates perform different

functions from the merchant sales representatives found in Consolidated Papers, Inc.

The Employer further argues that the sales associates have a separate and distinct community of interest from the petitioned-for unit. In support of its contention, the Employer notes that the sales unit in Los Angeles reports to the national sales organization in Secaucus, New Jersey and the sales associates' performance appraisals are forwarded to the national sales manager in Secaucus, New Jersey. The Employer also notes that sales associates support the sales personnel and that the sales associates are on the national sales payroll administered from the headquarters office and are the only employees entitled to an incentive plan. The factors noted, however, are insufficient to override the strong community of interest that exists among the sales associates and the other unit employees.

The Employer disputes the testimony on record from the regional sales associate that the sales associates spend a substantial portion of their time working along side or in close proximity with other Los Angeles office employees in the petitioned-for unit. Thus, the record reflects that sales associates have contact with the outside sales representatives only about five to six times a day over the phone, whereas the

sales associate are in frequent, close daily contact with the other unit employees.

Contrary to the Employer's assertion, the present case is also not analogous to the situation in Mitchellace, 314 NLRB 536 (1994). In Mitchellace, the data entry clerks were responsible for entering production data into computers and entered the production area only about once a week. In Mitchellace, the Board distinguished between office clerical and plant clerical employees. In the present case, the sales associates are not data entry clerks in a production environment. In the present case, the sales associates do not have a limited work-related contact with other petitioned-for unit employees. The record establishes that the sales associates have significant contact with the stipulated unit employees on a daily basis, including significant contact with the inbound customer service coordinators, pricing analysts, and freight cashiers in the performance of their duties.

Based upon the foregoing, I conclude that the sales associates share a substantial community of interest with the other employees in the petitioned-for unit, and I shall include them in the unit found appropriate herein. Sears, Roebuck & Co., 319 NLRB 607 (1995).

C. Regional Sales Associate⁵

The regional sales associate performs the same functions as the sales associates except that the position supports two senior account executives in the field with a volume of accounts and provides assistance to the sales associates. The regional sales associate steps in for other sales associates and provides assistance when necessary. The regional sales associate has daily contact with the pricing and customer service department hourly employees in coordinating contract amendments, filing contracts, and obtaining authorization to offer contracts to customers. The regional sales associate spends most of the work day troubleshooting customer service problems. The regional sales associate also contacts freight cashier clerks to confirm payments have been received, and obtain copies of the bills of lading. The regional sales associate also has regular and frequent contact with accounts receivable clerks to submit petty cash forms and request expense checks. The regional sales associate contacts equipment assistants to obtain information concerning what may be preventing a trucker from being released from the terminal to pick up a container.

The regional sales associate has the same pay dates, meal benefits, and medical benefits package as the Employer's

⁵ There is only one regional sales associate. The position is presently filled by Rosie Carrillo.

other Los Angeles office employees. The regional sales associates are closely aligned with the pricing and customer service departments and is physically located in close proximity to the pricing department. The regional sales associate is on the same floor as the Employer's other Los Angeles office employees. The regional sales associate uses the same lunch area as the Employer's other Los Angeles employees. The hours of operation for the regional sales associate is the same as for other Los Angeles employees. Employees start work between 8:00 a.m. and 9:00 a.m. and leave work between 4:00 p.m. and 5:00 p.m. and have a set lunch break from 12:00 to 1:00 p.m. The same sign in sheet is used for all the Employer's Los Angeles employees to record overtime and days worked.

The regional sales associate's wages are paid on the same hourly basis as the other employees included in the unit, except that they receive a separate incentive plan for bonuses from the national sales office in New Jersey. The regional sales associate works the same schedule as the other employees and receives the same benefit package including meal and medical benefits. The regional sales associates and the other hourly employees have the same work hours, sign in process, pay dates, and use the same lunch area.

The regional sales associate takes incoming calls from shippers, handles customer service issues, pricing and performs

a limited amount of telephone sales calls for salesmen in the field. The regional sales associate performs the clerical preparation for import contracts. The sales support is used to keep track of electronic mail message and phone calls while the sales representatives are out of the office. In performing these functions, the regional sales associate uses the same computer system and equipment as the other hourly employees at the Los Angeles office.

Because the regional sales associate is in frequent contact with the other unit employees, I find that there is a functional integration of the regional sales associates' duties with the other unit employees. In addition, the regional sales associate interacts frequently and works together with other department employees in the Employer's Los Angeles office to ensure the proper administration of contracts.

The Employer contends that the regional sales associate and sales associates have a separate and distinct community of interest from the petitioned-for unit. The record reveals that sales associates have contact with the outside sales representatives about five to six times a day over the phone. In contrast, the regional sales associate is in frequent contact with the unit employees and there is an integration of the functions of the regional sales associate and the pricing department employees.

Despite the Employer's contentions, it is concluded that the present case is not analogous to the situation in Mitchellace, 314 NLRB 536 (1994). In Mitchellace, the data entry clerks were responsible for entering production data into computers and entered the production area only about once a week. In Mitchellace, the Board was distinguishing between office clerical and plant clerical employees. In the present case, the regional sales associate is not a data entry clerk in a production environment. In the present case, the regional sales associate does not have a limited work-related contact with other petitioned-for unit employees. The record establishes that the petitioned-for employees have significant contact with each other on a daily basis. The record also reveals that the regional sales associate has significant contact with pricing analysts, equipment assistants, accounts receivable clerks, inbound customer service coordinators, freight cashiers and booking employees in the petitioned-for unit.

Based upon the foregoing, I conclude that the regional sales associate shares a substantial community of interest with the other employees in the petitioned-for unit and I shall, therefore, include her in the unit found appropriate herein. Sears, Roebuck & Co., 319 NLRB 607 (1995).

D. MIS⁶ assistant/BPS⁷ analyst⁸

The MIS assistant/BPS analyst spends 20 to 30 percent of the work day responding to unit employees' computer problems at the Los Angeles office. The MIS assistant/BPS analyst has daily contact with the Employer's hourly employees in the Los Angeles office when troubleshooting hardware and software problems. The MIS assistant/BPS analyst may be called upon two to three times per week to perform MIS duties and resolve hardware or software problems. The MIS assistant/BPS analyst fixes or replaces computers and printers for the Los Angeles office. In performing these duties the MIS assistant/BPS analyst is not required to have a college degree.

The MIS assistant/BPS analyst spends 80 to 90 percent of the work day training the Employer's Los Angeles employees on the BPS system. The MIS assistant/BPS analyst reports to the BPS organization managers in New Jersey in performing BPS duties and is serviced by the New Jersey headquarters payroll office. The MIS assistant/BPS analyst is responsible for training and implementing the IRIS-II⁹ system at the Employer's Los Angeles office.

⁶ MIS refers to "Management Information Systems".

⁷ BPS refers to "Business Processing Systems".

⁸ There is only one MIS assistant/BPS analyst. The position is presently filled by Raymond Charles Washington.

⁹ The IRIS-II is a new computer software system that creates a different business process and is being implemented for use by all petitioned-for unit employees.

While the MIS assistant/BPS analyst is supposed to be reviewed by the BPS manager in New Jersey, in December 2001, the regional vice president of the Employer's Los Angeles office issued the MIS assistant/BPS analyst's last performance review, signed the appraisal form, and provided performance feed back. This performance review was latter followed up by the New Jersey office BPS manager who provided a more detailed telephonic performance review in January 2002.

The MIS assistant/BPS analyst receives weekly assignments and job tasks from the BPS manager in New Jersey. The MIS assistant/BPS analyst has daily contact with the vice president of the Los Angeles office who knows what work is performed during the course of a day. The MIS assistant/BPS analyst keeps the vice president of the Los Angeles office informed via e-mail as to his location when working outside the office for the entire day. The MIS assistant/BPS analyst may be out at the Ontario office one or two times a week.

The MIS assistant/BPS analyst has the same pay dates, meal benefits, and medical benefits package as the Employer's other Los Angeles office employees. The MIS assistant/BPS analyst is physically located in close proximity on the same floor as the Employer's other employees in the Los Angeles office. The MIS assistant/BPS analyst work in a separate training room that was furnished and designed for the purpose of

testing systems and training Los Angeles office employees. The MIS assistant/BPS analyst uses the same lunch area as the Employer's other Los Angeles employees and the hours of operation are the same as for other Los Angeles employees. The MIS assistant/BPS analyst works from 8:00 a.m. to 4:30 p.m. Monday through Friday with a set lunch break from 12:00 to 1:00 p.m. The same sign in sheet is used for all the Employer's Los Angeles employees to record overtime and days worked.

The record discloses that the MIS assistant/BPS analyst's wages are paid on the same hourly basis as the other employees included in the unit. The MIS assistant/BPS analyst works the same schedule as the other employees at the Los Angeles office and receives the same benefits package and insurance. The MIS assistant/BPS analyst and the other hourly employees at the Los Angeles office have the same work hours, lunch period, and use the same lunch area.

While the MIS assistant/BPS analyst receives some supervision from the New Jersey headquarters concerning weekly assignments, the record clearly establishes that the MIS assistant/BPS analyst's maintains day-to-day supervisory contact with Regional Vice President of the Los Angeles office. The regional vice president of the Los Angeles office is familiar with the MIS assistant/BPS analyst daily work. The regional vice president issued the MIS assistant/BPS analyst's last

performance review, signed the appraisal form, and provided performance feed back in the middle of December 2001. This performance review was latter followed up by the New Jersey office BPS manager who provided in January 2002 a more detailed performance review.

While the MIS assistant/BPS analyst receives different training on the BPS system, 20 to 30 percent of the day consists of performing MIS trouble shooting for the Los Angeles office hardware and software problems. In performing the MIS assistant/BPS analyst work a college degree is not required. The MIS assistant/BPS analyst is in frequent contact with hourly employees of the Employer's Los Angeles office from different departments in performing both the BPS training and the MIS computer troubleshooting duties.

The Employer argues that the BPS analyst position is a technical position that should be excluded from the petitioned-for unit. In this regard, it stresses that the employees are separately supervised, have undergone extensive and specific training, spend a significant time away from the Los Angeles office and are paid from the COSCO headquarters payroll. In support of its contention, the Employer cites Ohio Casualty Insurance Co., 175 NLRB 860 (1969), where technical employees were excluded from a unit of clerical employees and Hamilton Test Systems, Inc. v. NLRB, 743 F.2d 136 (2nd Cir. 1984), where

groups of employees were excluded because they only spent 3 hours per week at the employer's facility and had no interchange with other employees.

Despite the Employer's contentions, it is concluded that the present case is not analogous to the situations in Ohio Casualty Insurance Co. and Hamilton Test Systems Inc. First, in Ohio Casualty Insurance Co., the computer programmers were required to use a number of computer languages demanding sophisticated programming skills and previous computer experience. Thus, the petitioners in that case were not seeking to include the computer programmers. In the present case, the record reveals that the MIS assistant/BPS analyst is not required to possess any specific degree, certification or training and the MIS assistant/BPS analyst is not required to utilize programming languages. The record also reveals that all the petitioned-for unit employees work on a computer, have received training on the IRIS-II program, and they all possess skills to address customer service inquiries.

Second, in Hamilton Test Systems Inc., the Board held that the field service representatives and customer service supervisors did not share a community of interest with the petitioned-for unit where the field service representatives only spent 3 hours per week at the employer's facility, separately

supervised, had no interchange with other employees and had a separate promotional ladder. In the present case, the MIS assistant/BPS analyst provides IRIS-II initial and follow-up training for all petitioned for employees and the MIS assistant/BPS analyst works on the petitioned-for employees' computers to fix any software and hardware problems. In the present case, the interaction and interchange between the petitioned-for unit and the MIS assistant/BPS analyst is substantial. Additionally in the present case, the MIS assistant/BPS analyst has only left the work site on two occasions for IRIS-II training and it is estimated that the MIS assistant/BPS analyst has not spent more than 30 percent of the time away from the Employer's Los Angeles office. In the present case, the record reveals that the MIS assistant/BPS analyst is paid on an hourly basis, however, there is no evidence of a separate promotional ladder or benefits.

Based upon the foregoing, I conclude that the MIS assistant/BPS analyst shares a substantial community of interest with the other employees in the petitioned-for unit and accordingly I will include the position in the appropriate unit.

Computer Systems, 204 NLRB 225 (1973)

E. BPS analyst¹⁰

The BPS analyst spends 100 percent of the time working at the Employer's Los Angeles. The BPS analyst reports to the BPS organization managers in New Jersey in performing BPS duties and is serviced by the New Jersey headquarters payroll office. The BPS analyst is responsible for training and implementing the IRIS-II system at the Employer's Los Angeles office.

The BPS analyst is supposed to be reviewed by the BPS manager in New Jersey. In December 2001, however, the regional vice president of the Employer's Los Angeles office issued the BPS analyst's last performance review, signed the appraisal form, and provided performance feed back. This performance review was latter followed up by the New Jersey office BPS manager who provided a more detailed telephonic performance review in January 2002. The vice president of the Los Angeles office is familiar with the BPS analyst's daily work. The BPS analyst receives training outside of southern California and spends 50 percent of the time outside the office receiving training, meeting with vendors, or training other COSCO facilities outside of Los Angeles.

The BPS analyst has the same pay dates, hours of work, meal benefits, and medical benefits package as the Employer's other Los Angeles office employees. The BPS analyst's work area is

¹⁰The BPS analyst did not testify at the hearing. There is only one BPS analyst position held by Patrick McCall.

physically located in close proximity on the same floor as the Employer's other employees in the Los Angeles office. The BPS analyst works in a separate training room that was furnished and designed for the purpose of testing systems and training Los Angeles office employees. The BPS analyst uses the same lunch area as the Employer's other Los Angeles employees. The hours of operation for BPS analyst is the same as for other Los Angeles employees. The same sign in sheet is used for all the Employer's Los Angeles employees to record overtime and days worked.

The BPS analyst's wages are paid on the same hourly basis as the other employees included in the unit. The BPS analyst works the same work schedule as the other employees and receives the same benefits package and insurance.

While the BPS analyst receives some supervision from the BPS supervisor at the New Jersey headquarters concerning weekly assignments, the BPS analyst maintains day-to-day supervisory contact with regional vice president of the Los Angeles office. The regional vice president is familiar with what the BPS analyst does during the course of a day. Although the BPS analyst receives different training on the IRIS-II computer system, the major purpose is to train the staff in the Los Angeles office in the their use of the IRIS-II system. The IRIS-II system is being implemented so that the petitioned-for

unit employees can use the new system in performing their work. In addition, the BPS analyst interacts frequently and works together with other department employees in the Employer's Los Angeles office in providing BPS training.

The Employer also argues that the BPS analyst position is a technical position that should be excluded from the petitioned-for unit. In this regard, it submits the same argument and relies on the same case support as in the analysis of the MIS assistant/BPS analyst position. Based on the same reasoning noted above, the cases cited by the Employer are distinguishable and I conclude that the BPS analyst shares a community of interest with the unit employees. I shall, therefore, include the BPS analyst in the unit found appropriate herein. Computer Systems, 204 NLRB 255 (1973)

V. Temporary Employee

The Employer contends that inbound customer service coordinator Mota should be ineligible to vote because he is a temporary employee.

A. Board Standards

The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. Thus, if the tenure of the disputed individual is indefinite and they are otherwise eligible, they are permitted to vote. United States Aluminum Corp., 305 NLRB

719 (1991). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, such employees are excluded as temporaries. Indiana Bottled Gas Co., 128 NLRB 1441 fn. 4 (1960); Owens-Corning Fiberglas Corp., 140 NLRB 1323 (1963).

B. Facts

Mota¹¹ was originally hired to fill-in for an accounting employee, Marina Martinez, who was away from work due to medical illness. Mota was in the accounting department for at least 2 to 3 months. The Employer wanted to retain Mota, and he was therefore moved to the inbound section as an inbound customer service coordinator. The record discloses that Mota does not qualify for medical benefits at this time because he has not worked over 1,000 hours in a calendar year. No testimony was presented regarding what Mota was told concerning the tenure of his employment.

C. Analysis

The Employer asserts that Mota is a temporary employee. The record fails to disclose whether Mota has any expectancy of continued employment and the basis for that expectancy.

¹¹ Mota did not testify at the hearing.

The Employer contends that Mota's term is temporary because the date is not fixed by calendar date, but rather on when an employee on workers' compensation leave, will return. The employer contends that according to Caribbean Communications Corp., 309 NLRB 712, 713 (1992), the definite date may be fixed either by a calendar date or by reference to the completion of a specific task or project. The Employer contends that Mota was temporarily hired to replace an employee absent on worker's compensation. The record, however, reveals that after hiring Mota, the Employer expressed an interest to retain Mota, he was then moved to the Inbound section as an inbound customer service coordinator. Based on the record presented, it is concluded that there is insufficient basis to determine if Mota is a temporary employee. I shall, permit him to vote subject to the challenge ballot procedure.

There are approximately 29 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work

during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services in the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Office Clerical Unit, Marine Clerks Association, International Longshore and Warehouse Union, Local 63, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to this election should have access to a list of voters in the unit and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California, 90017, on or before April 12, 2002. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349

(1995). Failure to do so stops employer from filing objections based on non posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 1022.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 19, 2002.

DATED at Los Angeles, California, this 5th day of April, 2002.

S/Victoria E. Aguayo

Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board

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